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April 17, 1996

VIA HAND DELIVERY

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Federal Communication Commission
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RE: CS Docket No. 95-184, Notice of Proposed Rulemaking:
Comments of the National Private Telecommunications
Association

Dear Filing Clerk:

Enclosed please find the original plus nine copies of the
comments of the National Private Telecommunications Association for
filing in the above referenced Docket.

Pursuant to the procedural provisions of the notice of
proposed rulemaking, an original plus nine copies have been
submitted so that each Commissioner may receive a personal copy of
the NPTA's comments.

If you have any questions or comments, please do not hesitate
to contact me.

Sincerely,

*Miguel A. Huerta for
Steve Bickerstaff*

Steve Bickerstaff

enclosures

Or 9

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	§	
	§	
Telecommunications Services	§	CS Docket No. 95-184
Inside Wiring	§	
	§	
Customer Premises Equipment	§	

Reply Comments of the National Private Telecommunications
Association to GTE Service Corporation

The National Private Telecommunications Association ("NPTA"), an association of shared tenant services ("STS") providers that offer services to tenants in residential multi-tenant environments such as residential high-rise buildings and apartment complexes, respectfully submits these comments in response to the Comments of GTE Service Corporation.

GTE is engaged in an outrageous act of duplicity. GTE Service Corporation has misrepresented to this Commission the actions of GTE's domestic operating companies in terms of whether GTE has been willing to relocate telephony points of demarcation at Multi-Dwelling Unit (MDU) locations when requested to do so by the proper owner. Moreover, GTE of the Southwest (GTE-SW) has misrepresented rules of this Commission to the Public Utility Commission of Texas in an effort to justify that Company's starkly anticompetitive conduct in Texas. Such duplicity should not be tolerated.

GTE Service Corporation filed comments in this proceeding on March 18, 1996, on behalf of its domestic telephone operating companies and GTE Media Ventures Incorporated (collectively, "GTE"). In its comments to the Commission, GTE writes that any new inside wiring policies should be "designed to promote full and fair competition in the market for local video and telephony services" and "maximize subscriber choice and convenience in the selection of alternative providers." Comments of GTE, p. 2. Specifically, GTE would like to see cable inside wiring rules be consistent with telephony inside wiring rules and "believes that the Commission should immediately deregulate inside wiring rates for cable and extend control over all cable inside wiring to subscribers, just as it has done for telephony." Comments of GTE, p. 17. In GTE's view, this "will provide consumers with more service options and arrangements, will lead to greater competition in the market for inside wire and lower costs to consumers." Id.

In major part, GTE requests that this Commission adopt rules for video cabling that would allow the property owner of the MDU to have a common point of demarcation. In support of its request, GTE correctly points out that this Commission's rules for telephony allow the property owner this power. But GTE then misleads this Commission by claiming that GTE has willingly moved its demarcation points at MDUs. GTE even emphasizes this point by stating that "the termination of network services at a minimum

point of entry has certainly not impaired GTE from developing and providing new telecommunication services to its subscribers." Comments of GTE, p. 7, f.n.7.

But the reality of GTE-SW's conduct in Texas is in stark conflict with its representations to this Commission. For over a year, two of the NPTA's members have been embroiled in a bitter legal dispute at the Public Utility Commission of Texas with GTE-SW, a domestic operating company of GTE. At the center of the Texas dispute is GTE-SW's refusal to provide a single point of demarcation at an MPOE on MDU properties when such a single point of demarcation would allow access by tenants to an STS provider at the MDU. The Texas proceeding was originated and maintained as a complaint that GTE-SW was in violation of its Texas tariff. As a complaint based on a state tariff, the Public Utility Commission of Texas rather than this Commission was the proper forum for that proceeding. The NPTA raises the issue of the Texas proceeding here for the sole purpose of making this Commission aware of GTE-SW's misrepresentations of this Commission's rulings to the Texas Commission.

Throughout the Texas proceeding, GTE-SW took the position that GTE-SW would not "give away the farm" and that GTE-SW never anticipated that anyone, including the property owner, would be bold enough to demand use of GTE-SW's previously installed cable.

Tx. P.U.C. Dkt. No. 14147¹, Reply Brief of GTE-SW, p. 7. Although GTE appears before this Commission clothed in an apparent spirit of competition, it has simultaneously attempted to stifle competition by misusing the same FCC telephony rules and regulations it now claims should guide this Commission's revision of cable inside wiring rules and justification for its actions.

The actions undertaken by GTE-SW in Texas have been determined by a Texas Administrative Law Judge to be "unreasonable, discriminatory, and anti-competitive in violation of its tariff and [Texas Public Utility Regulatory Act 1995], and inconsistent with FCC rules." Tx. P.U.C. Dkt. No. 14147, Proposal For Decision, p. 40. A copy of the report of the Administrative Law Judge is enclosed. In his summary of facts in the decision, the ALJ found that GTE-SW abruptly changed its policy of relocating demarcation points as it had done at other properties served by an NPTA member, but did not change its state tariff to reflect any changes in policy:

GTE-SW management established a policy in December 1994 of not relocating multiple demarcation points to a single demarcation point at the request of STS providers whose sole

¹ Throughout these comments, "Tx. Dkt. No. 14147" refers to a proceeding before the Public Utility Commission of Texas styled *Complaint of GE Capital ResCom and MultiTechnology Services, L.P. Against GTE Southwest Incorporated for Refusal to Relocate Demarcation Points*, Docket No. 14147, ___ P.U.C. BULL. ___ (April 1, 1996) and the documents filed therein.

purpose was to use, purchase or lease GTE-SW's previously installed cable and the Company has not amended its STS tariff to reflect the policies and practices regarding the relocation of demarcation points to a single point for use, sale or lease to STS providers. Id. at p. 16.

GTE-SW's position throughout the Texas proceeding was that building owners and STS providers must build a duplicate inside wiring system because GTE-SW would not allow them access to carrier-installed existing cable. In GTE's comments to this Commission it makes clear that it wishes to avoid a scenario in which "competitive providers, such as GTE, will be forced to install duplicative and unnecessary cable" to comply with FCC rules. Comments of GTE, p. 8.

At the heart of GTE's comments to this Commission is that competition will benefit from requiring "common points of demarcation" for video cable at MDUs to conform to a definition consistent with that for telephony. Comments of GTE, p. 4-5, 7-12, 17. But, at the same time that GTE is telling this Commission that FCC telephony rules make it possible for customers to access both single and complex wiring and that control over such wiring should rest with the subscriber, GTE-SW is representing to at least one state regulatory commission that Part 68 of this Commission's telephony rules allow GTE-SW to refuse customer access to existing cable at MDU locations and that any state commission order allowing use of GTE-SW's cable

(even with compensation) would be an unconstitutional "taking" of GTE-SW property.

Before this Commission, GTE states, "Deregulating the rates for cable inside wiring and giving subscribers immediate control over cable-installed wiring would not constitute a 'taking' as long as the operator is compensated for the cost of the wiring." Comments of GTE, p. 19. At the Texas Commission, GTE-SW argued that:

[T]he Fifth and Fourteenth Amendments of the United States Constitution recognize and protect GTE-SW's property rights and the right to freedom of contract. By laying its network cable in the ground, GTE-SW does not deed that cable to the public or to the property owner on whose property the cable sits... A forced donation of one's property for public "use" is tantamount to a taking, even if the owner is technically not deprived of the title to the property. Tx. P.U.C. Dkt. No. 14147, Opening Brief of GTE-SW, p. 15.

GTE-SW argued in Texas that allowing control over inside wiring to an entity (i.e. subscriber) other than the carrier that installed the wiring is a "taking", even if the operating company is compensated for the wiring or is not deprived of the title to the property. GTE now claims before this Commission that it should be allowed to use the inside wiring of video cable companies and that such a scenario would not be a taking if the installing carrier were compensated and retained ownership for accounting purposes.

It is difficult to imagine any more direct conflict between what a company "says" to this Commission and what the company says and does outside the sight of this Commission. The inconsistency in these positions is shocking but easily explained. In Texas, GTE-SW is an incumbent LEC that is engaged in an effort to stifle possible competition within its exchange area. At the Federal level, GTE sees itself as an alternative provider of video cable services that seeks to compete with the incumbent cable carriers for the provision of video services.

For the past year, GTE-SW has taken the position that under this Commission's telephony rules, GTE-SW is entitled to decide on a case-by-case basis whether to use a single point of demarcation at MDU locations and that it can and will refuse to use a single point of demarcation at STS locations when to use a single point of demarcation would allow an STS operator to "take" GTE's customers. Tx. P.U.C. Dkt. No. 14147, GTE-SW's Motion to Dismiss and Memorandum of Law, p. 2. GTE-SW has also argued that it is free to choose the location of its demarcation points on a case-by-case. GTE-SW has insisted on these position even though its own state tariff and written internal guidelines provide otherwise. Not surprisingly, the Administrative Law Judge in the Texas proceeding found such ad hoc conduct to be unlawful. But GTE-SW continues to urge that this Commission's current telephony rules allow GTE-SW to engage in such conduct and that the State

of Texas is powerless to make GTE-SW abide by its state tariff or internal guidelines.

Given the actions of its operating company, it is ironic and shocking that GTE would claim to this Commission that since the detariffing of inside wiring, firms such as shared tenant services providers have flourished and that altering telephone inside wire rules could potentially force such customers to relinquish control over much of their telecommunications services wiring.² Comments of GTE, p. 6. At the Texas Commission GTE-SW has historically and stubbornly fought STS providers at every turn, including, most recently, on the ground that control of inside wiring rests with the incumbent carrier that installed the inside wiring.

In short, GTE has presented to this Commission what it believes this Commission to want to hear while presenting a very different picture of demarcation point policy to the Texas Commission. Such anti-competitive conduct should not be condoned by state or federal regulatory authorities. GTE should be held to account by this Commission for its unlawful and anti-

² NPTA agrees with the merits of GTE's argument on this point. A change in such telephony rules to curtail the right of the subscriber or property owner to control inside wiring would wreck havoc on STS providers. But, it is extreme hypocrisy for GTE before this Commission to profess concern over the welfare of STS providers while its operating companies continue a campaign of anticompetitive conduct intended to destroy those same STS providers.

competitive conduct and its hypocritical and misrepresentative position before this Commission. NPTA submits these comments so that this Commission can be aware of GTE's outrageous conduct.

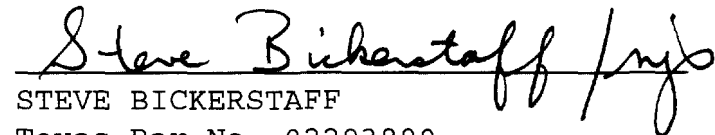
Respectfully submitted,

NATIONAL PRIVATE TELECOMMUNICATIONS
ASSOCIATION

By

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Attorneys for the National Private
Telecommunications Association

April 17, 1996

State Office of Administrative Hearings



Steven L. Martin
Chief Administrative Law Judge

April 1, 1996

TO: Paula Mueller
Public Utility Commission of Texas

RE: SOAH Docket No. 473-95-1190; PUC Docket No. 14147; Complaint of GE Capital ResCom and Multitechnology Services, L.P. Against GTE Southwest Incorporated for Refusal to Relocate Demarcation Points

Enclosed are the original and one copy of the Proposal for Decision (PFD) and Proposed Order (PO) in the above-referenced docket. Please file-stamp and return the copy to the State Office of Administrative Hearings (SOAH) for our records. Also enclosed is a disk containing an electronic copy of the PFD and PO. By copy of this letter, the parties to this proceeding are being served with the PFD and PO.

Please place this docket on an open meeting agenda for the Commissioners' consideration. There is no jurisdictional deadline. It is my understanding that you will be notifying me and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Sincerely,

A handwritten signature in cursive script that reads "Michael J. O'Malley".

Michael J. O'Malley
Administrative Law Judge

Enclosure

xc: All Parties of Record (without disk)

SOAH DOCKET NO. 473-95-1190
PUC DOCKET NO. 14147

COMPLAINT OF GE CAPITAL RESCOM AND MULTITECHNOLOGY SERVICES, L.P. AGAINST GTE SOUTHWEST INCORPORATED FOR REFUSAL TO RELOCATE DEMARCATION POINTS	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**SOAH DOCKET NO. 473-95-1190
PUC DOCKET NO. 14147**

COMPLAINT OF GE CAPITAL	§	
RESCOM AND MULTITECHNOLOGY	§	BEFORE THE STATE OFFICE
SERVICES, L.P. AGAINST GTE	§	
SOUTHWEST INCORPORATED FOR	§	OF
REFUSAL TO RELOCATE	§	
DEMARICATION POINTS	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

A. Background Information

On May 30, 1995, National Residential Service Corporation (NRSC), GE Capital ResCom (ResCom), and Multitechnology Services, L.P. (MTS) (jointly referred to as Complainants) filed a complaint against GTE Southwest Incorporated (GTE-SW or the Company), alleging that GTE-SW had violated its Shared Tenant Service (STS) Tariff and internal demarcation guidelines (also referred to as GTEP-610-148-010) by refusing to relocate multiple points of demarcation in certain of Complainants' multi-unit properties to a single point of demarcation at the minimum point of entry (MPOE).¹ The demarcation point is a physical location separating the customer-owned telephone wiring from the telephone company-owned wiring. The MPOE may be either (1) where the wiring crosses the property line or (2) where the wiring enters a building or buildings.

ResCom and MTS are STS providers that offer services to tenants in residential high-rise buildings and apartment complexes. ResCom and MTS typically provide access to local exchange voice and data, long distance voice and data, as well as video and climate control services to tenants in the properties which they serve. ResCom and MTS are the agents of the owners of the properties in which they provide residential multi-tenant services. ResCom and MTS obtain service from GTE-SW's STS tariff to interface with the local network to provide the

¹ NRSC withdrew from the proceedings on July 18, 1995.

telecommunications services in the properties in GTE-SW's service territory. The Complainants also compete with GTE-SW for local exchange customers in multi-tenant complexes.

B. Summary of Parties' Positions

GTE-SW asserts that it has an internal policy, although not part of its tariff, that allows it to maintain multiple demarcation points on multi-unit properties. Further, GTE-SW claims that its practice of locating the network demarcation point complies with its tariff and internal guidelines, 47 C.F.R. § 68.3 (also referred to as Part 68 of the FCC Rules) and *In the Matter of Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules filed by the Electronic Industries Association*, CC Docket No. 88-57, 5 FCC Rcd 4686 (June 14, 1990) (CC Docket No. 88-57), Public Utility Regulatory Act of 1995, Art. 1446c-0 (Vernon Supp. 1996) (PURA 95), and the Public Utility Commission of Texas' (PUC's or the Commission's) Rules.

Complainants have requested that GTE-SW establish a single demarcation point at MPOE where GTE-SW's wire crosses the property line in each complex. Multiple demarcation points currently exist in each building. Complainants assert that GTE-SW's refusal to relocate the demarcation point is discriminatory, anti-competitive, and unreasonable in violation of the Public PURA 95 §§ 3.215 and 3.217, GTE-SW's tariff and internal guidelines, and the requirements of the FCC in CC Docket No. 88-57 and 47 C.F.R. § 68.3. Complainants also request that the Commission require GTE-SW to amend its tariff to incorporate its demarcation practice.

The Commission's General Counsel agrees with the Complainants that GTE-SW is in violation of PURA 95 §§ 3.215 and 3.217, CC Docket No. 88-57, and 47 C.F.R. § 68.3. General Counsel also believes that GTE-SW should file an updated tariff with the Commission that details its demarcation practice. According to the General Counsel, without the tariff, the general public does not have notice of GTE-SW's demarcation practice.

C. Summary of ALJ's Recommendations

After a review of the evidence, the stipulation of facts (attached as Attachment A, which was admitted into evidence as Joint Ex. 1), and the parties' arguments, the Administrative Law Judge (ALJ) recommends that GTE-SW file a tariff that details its demarcation practice. Not only will the filing of the tariff notify the public of GTE-SW's demarcation practice, but it will likely prevent the filing of multiple complaint proceedings. Moreover, with the increase in competition in the telephone industry, it is reasonable for GTE-SW to have a tariffed demarcation practice.

Because GTE-SW does not currently have a tariffed demarcation practice filed at the Commission, the only practice that can be relied on for this proceeding is set forth in GTE-SW's internal guidelines. GTE-SW's internal demarcation guidelines, GTEP 610-148-010, Section 3.3.2 states that "[t]he point of demarcation can be established at the property line in cases where the owner desires it." *See* Attachment B (GTE-SW's internal demarcation guidelines, GTEP-610-148-010). GTE-SW has agreed that this allows a customer to request a rearrangement or alternate location for the point of demarcation. Att. A at 16, Nos. 92 and 93. For these reasons, and as further explained in the Proposal for Decision (PFD), the ALJ recommends that GTE-SW relocate the multiple demarcation points to a single demarcation point as requested by the Complainants.

The ALJ further finds that GTE-SW's demarcation practice is inconsistent with Part 68 of the FCC Rules, which requires a reasonable and nondiscriminatory demarcation practice. Because GTE-SW does not have a reasonable and nondiscriminatory demarcation practice, it is in violation of PURA 95 §§3.215 and 3.217 and its STS tariff.

II. PROCEDURAL HISTORY

On January 26, 1995, NRSC filed an informal complaint pursuant to P.U.C. PROC. R. 22.242(d) regarding the demarcation point issue. On February 21, 1995, ResCom filed its informal complaint. Neither of these complaints were resolved informally. MTS did not file an informal

complaint but filed its complaint directly with the Commission pursuant to P.U.C. PROC. R. 22.242 (d)(1)(C) because the complaint alleges anti-competitive practices by GTE-SW. No party objected to MTS foregoing the informal complaint process. On April 25, 1995, the Complainants filed their complaint with the Commission and requested that the case be docketed. The PUC's Director of Hearings assigned the docketed case to Judge Michael J. O'Malley, who presided over the proceedings.

On May 17, 1995, the first prehearing conference was held in this proceeding. At that prehearing conference, the ALJ established a procedural schedule leading to a hearing on the merits to begin on October 10, 1995, and ordered the Complainants to file a formal complaint setting forth all allegations.

On May 30, 1995, the Complainants filed their formal complaint alleging, among other things, that GTE-SW had violated its tariff and internal guidelines by refusing to relocate certain demarcation points.

On June 26, 1995, GTE-SW filed a motion to dismiss based on lack of jurisdiction, federal preemption, failure to state a claim, confiscatory regulation, waiver and equitable estoppel, and standing. On July 10, 1995, the Complainants and General Counsel filed briefs, opposing the motion to dismiss on all grounds. On July 19, 1995, GTE-SW filed a reply to the responses of General Counsel and the Complainants. On July 19, 1995, all parties filed briefs on notice and burden of proof.

On July 24, 1995, the ALJ abated the procedural schedule, pending the ALJ's ruling on the legal issues. On August 9, 1995, the ALJ issued Order No. 9, which denied GTE-SW's motion to dismiss on all grounds and concluded that GTE-SW had the burden of proof in this case. GTE-SW chose not to appeal the ALJ's ruling on the preliminary legal issue; therefore, on August 22, 1995, the ALJ issued Order No. 10 requesting that the parties agree on a procedural schedule by September 1, 1995. The parties were unable to reach an agreement on the procedural schedule;

therefore, the ALJ scheduled a prehearing conference for September 19, 1995, to set a procedural schedule. At the September 19, 1995 prehearing conference, the ALJ developed a procedural schedule with the hearing on the merits beginning on December 7, 1995.

On September 1, 1995, this docket was transferred to the State Office of Administrative Hearings (SOAH).

On October 31, 1995, the ALJ granted the motion to intervene of ActiveTel L.D., Inc. (ActiveTel). Although ActiveTel intervened, it never actively participated in the proceedings.

The parties requested that the hearing on the merits scheduled for December 7, 1995, be continued until December 19, 1995, and the ALJ granted the request. On December 19, 1995, the ALJ convened the hearing on the merits but recessed that same day to allow the parties to finalize a stipulation of facts. On December 20, 1995, the parties filed a stipulation of facts to streamline the contested case. *See* Attachment A. On that same day, the ALJ reconvened the hearing on the merits to clarify certain issues with the parties. On December 28, 1995, the ALJ admitted into evidence the stipulation of facts and exhibits A through M. The ALJ and the parties also asked clarifying questions regarding the stipulation of facts and exhibits A through M. Staff witness John Costello was the only witness to testify. During the hearing on the merits, the parties agreed to mediate the remaining disputed issues. The ALJ concluded the hearing on the merits on December 28, 1995, and requested that the parties notify him of the available dates for mediation.

On January 9 and 10, 1996, SOAH Judge Beth Bierman conducted the mediation in this case. After the mediation, the parties continued settlement negotiations for a month. On February 9, 1996, the ALJ issued Order No. 20 requesting a status report on the settlement negotiations. On February 14, 1996, the complainants informed the ALJ that they were unable to settle the remaining disputed issues. Based on this information, the ALJ set a briefing schedule with the final briefs due on March 18, 1996.

III. NOTICE

In Order No. 9, the ALJ determined that he had discretion, pursuant to P.U.C. PROC. R. 22.55, as to the type of notice for this complaint proceeding. In Order No. 9, the ALJ determined that, given the facts in this case, a specific type of notice would be appropriate for this proceeding. Therefore, the ALJ ordered that direct mail notice be provided to any GTE-SW customers who have expressed concern about their network demarcation point for multi-unit properties. GTE-SW assembled a list of customers who had expressed an interest in demarcation points and provided direct mail notice to these customers. GTE-SW also provided direct notice to trade organizations and groups that represent the interests of building owners and managers. On September 21, 1995, GTE-SW filed an affidavit of notice, verifying that notice had been provided as ordered. All prehearing conferences and the hearing on the merits were noticed in the *Texas Register*.

IV. JURISDICTION

A. Commission's Authority in this Proceeding

The Commission has jurisdiction over this complaint pursuant to PURA 95 §§ 1.101, 3.051(b), 3.201, 3.202, and 3.210(a). SOAH has jurisdiction over matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. § 2003.047 (Vernon Pamphlet 1996).²

GTE-SW initially challenged the Commission's jurisdiction over this proceeding in a motion to dismiss filed June 26, 1995. GTE-SW claimed that the Commission lacked jurisdiction over this proceeding because the Complainants desired to purchase GTE-SW's network wiring and GTE refused to sell, which is essentially a property dispute that the Commission would not have authority

² Text of sections as added by Acts 1995, 74th Leg., Ch. 765, § 1.35.

over. GTE-SW also claimed that the FCC had already exercised its jurisdiction over these matters, which preempted any authority the Commission might have. In Order No. 9, the ALJ denied GTE-SW's motion to dismiss and ruled that the Commission had jurisdiction over this proceeding. GTE-SW did not appeal this ruling to the Commission as it is allowed to do pursuant to P.U.C. PROC. R. 22.123.

In reviewing the initial complaint, the ALJ determined that the Commission had the authority to determine what GTE-SW's demarcation practice (both the tariff and internal guidelines) consisted of and to determine if GTE-SW's practice of locating demarcation points was in violation of PURA 95 as being unreasonable, discriminatory, or anti-competitive. Moreover, the ALJ found that the Commission always has the authority to regulate the business practices of a utility. The Commission is given this broad authority under PURA 95 § 1.101 as follows:

The commission has the general power to regulate and supervise the business of every public utility within its jurisdiction and to do all things, whether specifically designated in this Act or implied herein, necessary and convenient to the exercise of this power and jurisdiction.

The broad authority of the Commission also allows it to determine if GTE-SW is engaging in unreasonable, discriminatory, or anti-competitive practices. This authority is granted pursuant to §§ 2.201, 3.215, and 3.217. Further, the Commission has already asserted jurisdiction over a similar case involving location of demarcation points. *See* Attachment C, *Application of Southwestern Bell Telephone Company to Revise its Tariff to Redefine the Point of Demarcation and the Location of the Network Interface*, Docket No. 10831, 20 P.U.C. BULL. 1026 (June 9, 1994)(mem.)(Docket No. 10831). In that case, the Commission established a single demarcation point for multi-unit buildings and defined other provisions regarding the point of demarcation and the location of the network interface for SWB.

The ALJ also concluded that the FCC had not preempted the Commission's authority to determine if GTE-SW was in compliance with its tariff and internal guidelines. Although the ALJ

recognized that the FCC had addressed the demarcation issue at 47 C.F.R. § 68.3 and in CC Docket No. 88-57, the ALJ did not intend to issue an order conflicting with the FCC's authority, but rather intended to focus on GTE-SW's tariff and internal guidelines and the reasonableness of the tariff and internal guidelines, and further to determine if GTE-SW has violated any provisions of PURA 95. By concentrating on the issues described above, the Commission's decision will be directly within its authority and will not conflict with the FCC's authority.

Federal preemption only occurs if Congress expresses a clear intent to preempt state law, and this would occur if there is an actual conflict between state and federal law; compliance with both state and federal law is impossible; the federal law creates a barrier to state regulation; the federal law does not allow the States to supplement federal law; or state law stands as an obstacle to the objectives of the federal law. *Louisiana Public Service Comm'n v. F.C.C.*, 106 S. Ct. 1890, 1898-1899 (1986). None of the situations described in the *Louisiana Public Service Comm'n* case have occurred in this proceeding; therefore, federal preemption would not prohibit the Commission from rendering a decision in this case. The recommendations in this case are consistent with the FCC's Rules and Regulations.

If, however, the recommendations were inconsistent with the FCC's Rules and Regulations, then the Commission would have an obligation under the supremacy clause of the U.S. Constitution to enforce the federal law where it conflicted with the state law. *U.S. Const. Art. 4, § 2, cl. 1*. The text of PURA 95 also recognizes that a rule or order of the Commission may never conflict with federal law. PURA 95 §§ 1.404, 3.201, 3.460(b).

The Commission has previously determined that federal law preempted its authority. Most recently, the Commission determined that several rate sections in PURA had been preempted by the Energy Policy Act of 1992. *Investigation of the Impact of Open Access Comparability Transmission Terms and Conditions Accepted by Central and South West Services*, Docket No. 13400, Dismissal Order No. 6 on Appeal, 20 P.U.C. BULL. 1765 (Feb. 28, 1995). In that case, the Commission dismissed its PURA § 42 proceeding regarding two ERCOT utilities. The Commission determined

that Federal Energy Regulatory Commission preempted PURA jurisdiction over transmission rates, terms, and conditions in interstate commerce. *Id.* at 1787-88. A similar result was reached in *Application of CP&L, HL&P and SWEPCO for a 1-400 kVhVdc Transmission Line from Walker County Station South Through the Matagorda Station at the South Texas Nuclear Project*, Docket No. 5023, P.U.C. BULL. 490 (June 1, 1983). The Commission determined that the Federal Power Act preempted PURA § 54. *Id.* at 493.

The ALJ finds, however, that the FCC has not preempted the Commission's authority in this case because no conflict exists between the recommendations in this case and CC Docket No. 88-57 or 47 C.F.R. § 68.3. The recommendations in this case require GTE-SW to comply with its Commission-approved tariff, its written internal guidelines, and PURA 95. These recommendations are in compliance with CC Docket No. 88-57 and 47 C.F.R. § 68.3 as required by PURA §§ 1.404, 3.201, and 3.460. GTE-SW states in its post-hearing brief that it does not contest jurisdiction if the ALJ limits his decision to enforcement and interpretation of GTE-SW's tariff and enforcement of PURA 95, and this is exactly what the ALJ has done in this proceeding.

B. Abatement of this Proceeding Pending FCC Decision

In the alternative, GTE-SW has requested for the first time in its post-hearing brief that this proceeding be stayed pending an FCC ruling regarding the proper location of demarcation points in a case similar to the dispute in this case. *In the Matter of Request For Declaratory Ruling Regarding Demarcation Point at Washington Dulles International Airport*, CC Docket No. 95-149 (FCC 1995) (CC Docket No. 95-149). The request for a declaratory ruling was filed by the Metropolitan Washington Airports Authority on August 14, 1995. The request in CC Docket No. 95-149 at 1-2 states in part:

We ask that the Commission confirm the Authority's determination that there is a single demarcation point, located at a building on the airport that is leased to GTE for a central office. We show in this petition that this determination accords with the Commission's rules and policies, with GTE's policy for the establishment of

demarcation points (to the extent it has one) and with the public interest. Our extended efforts to settle this matter through negotiations have failed, and resolution of this dispute is urgently needed in order to enable the Authority to complete a shared tenant system that it has been seeking to deploy at Dulles for more than two years and to carry out a major expansion initiative at the airport.

GTE-SW argues that the Complainants should have sought relief at the FCC pursuant to its complaint process, 47 C.F.R. § 1.701, *et seq.* But because they did not seek relief at the FCC, GTE-SW argues that this proceeding should be abated pending a decision in CC Docket No. 95-149. GTE-SW states that the FCC has the opportunity to address an issue of establishing a single demarcation point and urges the PUC to defer to the FCC decision on this issue.

The ALJ recognizes that the Complainants could have pursued parts of their complaint at the FCC, but because the complaint alleges that GTE-SW has violated PURA 95 and its Commission-approved tariff, the ALJ believes that the Commission has authority to render a decision in this case. The ALJ does not believe it is necessary to abate this proceeding until the FCC resolves CC Docket No. 95-149. The decision in this case will address the specific facts of this complaint and enforce the appropriate provisions of PURA 95. This case will not be so broad as to interfere or conflict with the FCC's authority, rendering it unnecessary to abate this proceeding. Moreover, abatement would only delay this already protracted proceeding.

V. BURDEN OF PROOF

A. Recent Decision on Burden of Proof

Because the complaint alleges that GTE-SW's tariff and internal guidelines are discriminatory and unreasonable, and further alleges that GTE-SW is in violation of its tariff and PURA 95, the ALJ ruled in Order No. 9 that GTE-SW had the burden of proof in this proceeding under PURA 95 § 3.204. In its post-hearing brief, GTE-SW requested that the ALJ reconsider this ruling in light of a recent Court of Appeals decision--*AT&T Communications of the Southwest, Inc. v. P.U.C.*, 906 S.W.2d 209 (Tex. App.--Austin 1995, writ requested). Both the Complainants and General Counsel